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SABAH FOREST INDUSTRIES SDN BHD

v.

MAZLAN ALI

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HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K22-179-2004]
26 MARCH 2012

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CIVIL PROCEDURE: *Action - Mediation of dispute - Enforcement of mediation agreement - Whether there was mediation session conducted - Whether parties under misapprehension - Whether withdrawal of one party warranted termination of mediation session - Whether withdrawal pointed to absence of consensus between parties - Whether there was*

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binding agreement between parties at conclusion of mediation session

The plaintiffs, a timber concessionaire sought a declaration against the defendant that the plaintiffs had acquired a public right of way through the defendant's land which was situated at Kg Pantai, Sipitang, Sabah ('the land'). The defendant became the owner of the land on 28 March 2003 by virtue of a purchase agreement from the previous owner. The plaintiffs had constructed a gravel road stretching from their concession to their wood yard. The gravel road cut through part of the land and at the time of construction the land was State land. On 11 December 2004, the defendant erected a barrier on the gravel road on the land which effectively blocked the plaintiffs' transportation of logs to their wood yard. The defendant contested the claim and counterclaimed that his land was private property and no consent had been sought or given by him or the former owners to the plaintiff for their use. This dispute was mediated on 3 November 2008. The defendant also was present at the mediation session. At the end of the mediation session, the learned judge recorded that: (i) the plaintiffs were to withdraw the claim against the defendant; (ii) the plaintiffs and the defendant were to jointly inspect the damage to the defendant's land from March 2003-December 2004; and (iii) the assessment of damages be fixed before the Registrar in respect of the defendant's counterclaim on 26 November 2008. The application before the court, by the plaintiff, was for the enforcement of the terms agreed at the mediation, whereas the

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defendant submitted that there was no consensus at the mediation session and what had been recorded by the learned judge could not be treated as having been agreed by the parties. Hence, the issue before the court was whether there was a binding agreement between the plaintiff and the defendant at the conclusion of the mediation session.

Held (dismissing plaintiffs' application; setting down case for trial):

(1) Based on the Notes of Proceedings (NOP) there was no mention by anyone that the session conducted on 3 November 2008 was a mediation exercise or who had initiated the mediation session. Nor was there any explanation to the litigants themselves what the session entailed and what the ground rules were. Based on the notable features in the NOP, there was no mediation session conducted. (para 9)

(2) In a mediation process, the resolution must come from the parties and not from the neutral third party mediator. No order can be made by or come from the mediator. On the facts, the counsel for both parties were under a misapprehension of what was happening. The session should have been terminated once counsel for the defendant withdrew from the session whereby the withdrawal pointed that there was no meeting of minds between the parties. There was also no admission of trespass by the plaintiffs. (para 11)

(3) In a mediation settlement, the court must lean towards setting aside any settlement agreement whenever there is any hint of discontent by any party or that there is some ambiguity in the settlement agreement. On the facts, it was clear that there was no mediation agreement signed between the plaintiff and the defendant. (para 13)

Other source(s) referred to:
Dispute Resolution Negotiation, Mediation and other Processes, 3rd edn, 1999, 3 Ch 3, p 123

For the plaintiff - Celestina Stuel Galid; M/s Jayasuriya Kah & Co
For the defendant - Lim Pitt Kong; M/s Mahap Jelani & Co

Reported by Shankar Krishna

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JUDGMENT

David Wong Dak Wah J:

Proceeding

B **[1]** Before me is an application by the plaintiffs to enforce the terms allegedly agreed by way of a mediation exercise conducted by the court on 3 November 2008. As far as the defendant is concerned there was no consensus at the mediation session and what had been recorded by the learned judge cannot be treated C as having been agreed by the parties.

Background Facts

[2] By a claim dated 16 December 2004, the plaintiffs had D sought a declaration against the defendant that the plaintiffs had acquired a public right of way through the defendant's land which is situated at Kg Pantai, Sipitang, Sabah (land). The defendant became the owner of the land on 28 March 2003 by virtue of a purchase agreement from the previous owner. Sometime in 1989 E and around 1990, the plaintiffs had constructed a gravel road stretching from their concession to their wood yard. That gravel road cut through part of the land and at the time of construction of the gravel road the land was State land. On 11 December 2004, the defendant erected a barrier on the gravel road on the F land which effectively blocked the plaintiffs' transportation of logs to their wood yard. The plaintiff had also sought an injunction against the defendant to compel him to dismantle the barrier.

[3] The defendant denied the claim and counter-claimed against the plaintiff for trespass on the ground that his land is private G property and no consent had been sought or given by him or former owners to the plaintiff for their use.

[4] This dispute was mediated by the learned judge on 3 November 2008 in which the plaintiffs were legally represented H by Celestina Stuel Galid and Jenny Lim with Hoh Cheon Fatt from and representing the plaintiffs' office. The defendant was present at the mediation session and was legally represented by Sonny Durai and Suzeianah Saulkmen. At the end of the mediation session, the learned judge recorded the followings:

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1. The plaintiffs to withdraw the claim against the defendant,

2. The plaintiffs and the defendant are to jointly inspect the damage to the defendant's land (if any) from March 2003 - December 2004, and

3. That the assessment of damages be fixed before the Registrar in respect of the defendant's counter-claim on 26 November 2008.

[5] What has given rise to dispute is that there is whether the assessment of damages exercise to be conducted by the Registrar relates to the element of trespass. As far as the plaintiffs are concerned, there was no admission of liability of trespass but they were willing to pay the assessed damages for the use of the defendant's land. For the defendant, the element of trespass must be taken into account in the assessment of damages by the Registrar. What had happened, three separate mention sessions were conducted by the Registrars to determine the real intention of the parties. This impasse was made known to me by the Registrar sometime early December 2011, upon which I directed the Registrar on the next mention date that was 16 December 2011 to transfer the matter to me for case management. This matter was listed before me on 11 January 2012 and at the mention hearing, I directed counsel for the plaintiffs to file in this application so that this matter can be resolved once and for all.

Issue

[6] From the submissions and the affidavits filed, it is my view that there is only one issue and it is this:

> Whether there was a binding agreement between the plaintiff and defendant at the conclusion of the mediation session dated 3 November 2008?

[7] Before I deliberate on the issue, it is only appropriate that I set out what mediation means. Mediation has been defined by the learned authors of *'Dispute Resolution Negotiation, Mediation and other Processes'* (3rd edn, 1999) 3 Ch 3, p. 123' as follows:

A Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or Judge, has no power to impose an outcome on disputing parties. Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide information, help the parties to understand each others' views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

[8] There are mainly two types of mediation and they are known as facilitative and evaluative mediation. In facilitative mediation, the mediator only facilitates the sessions between the parties and at no time gives any evaluation of the merit of the dispute. He or she may of course suggest options for settlement for parties to consider. In evaluative mediation, the mediator expresses his views on the merit of the case in caucus or private to the respective parties and may even suggest to one of the parties that it would be in their interests to settle rather than have the matter litigated in court. The mediator can be said to be in control of the manner in which the mediation is conducted and is very much a solution driven exercise. If I may add here, irrespective of which method of mediation is used, it is a voluntary process of negotiation between two parties and if at any time of the process, one of the parties feel that it does not wish to continue with the process, he or she has the right to withdraw from it be it conducted by a judge or an non judicial mediator. Further, in a judge led mediation, it is not and never an extension of a court session. To put it bluntly, the judge is a mere mediator and does not possess any judicial power at all during the mediation session. With that I now deliberate the issue at hand and to do that, my starting point must be the notes of proceeding as produced in exhibit HKL2 (NOP).

[9] The first notable feature in the NOP is that there was no mention by anyone that the session conducted on 3 November 2008 was a mediation exercise or who had initiated the mediation session. Nor with respect was there any explanation to the litigants themselves what the session entails and what the ground rules were. Was it to be conducted in a facilitative or an evaluative approach? Or was it a settlement conference conducted during a case management mention day? On a cursory glance of the NOP, there is little doubt that the learned judge had adopted an evaluative approach and it is quite evident that the matter in dispute is whether the plaintiffs had agreed or conceded to the element of trespass on their part on the defendant's land. It is this very issue which the learned judge was trying to fashion an agreement between the parties. This is what had transpired:

Court:	Plaintiff signed the agreement and not aware of the road. The Government should have clarified this to them first. The Company remained the same but the entity has changed. It's a different person already. These people should be informed. All this while, the Government has been taking things lightly. The Court has to be fair to both sides in upholding justice. The Government is at fault not SFI but Plaintiff still required to submit their application to enforce the right. Mazlan does not have to answer to SFI but the Government is.
Clestina:	I have to take instruction from my client first.
Court:	Plaintiff has sued a wrong person as Mazlan was not been informed in writing that there is a Public road on his land and the Government did not tell him that they are exercising their rights.
Sonny:	My client's cost and the injunction proceedings cost is yet to be paid.
Court:	If the case went for trial and at the end of the day I allowed the plaintiff's claim, they indirectly have the right, then the Government would be at fault and they should expedite the acquisition matter or they are answerable to the plaintiff's letter of their rights.
Sonny:	The Defendant should have received his compensation on trespassing on his land of many years but how to get the Government to pay for it?

A Court: All this while the plaintiff have the right to use the said road and not aware of the Defendant. I will let you all to decide who will pay the damage either the Government or the plaintiff.

Sonny: I might appeal on behalf of my client as he has spent
B RM60,000.00 and another RM40,000.00 for lawyer.

Court: I will decide Mazlan's predicament.

Sonny: He is asking for compensation.

C Court: Very nominal amount of compensation on his counter-claim and if you are not satisfied then you **have the right to appeal**. (emphasis added)

Sonny: What about the cost? If the Plaintiff wishes to withdraw their claim then they have to pay the cost.
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Court: No. I will order to be withdrawn and they can appeal but I will give a nominal amount on the counter-claim.

Sonny: On the issue of damages for trespassing it is to be ascertained by the Deputy Registrar.
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Court: What are you worrying? You have the right to explain to your client the legal terms and **let him decide to appeal as he has the right to do so**. I don't care whether there is another road being used, do not press me on it. (emphasis added)
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Sonny: My client doesn't want it to be there.

...

Court: SFI is not to be blamed as they thought that they
G have the right to use the said road and the Government did not take any step to reply SFI's letter as such how could you ask for compensation from them. I can only give a nominal amount of compensation.

H Celestina: I have to take instruction from my client first whether they are agreeable to withdraw the action with liberty to file a suit against the Government pertaining the land acquisition and no order as to costs.

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Court: Plaintiff should pay the costs as they sued the wrong party which in fact it should be the Government.

Celestina: We think that the damages should be in nominal amount. I will talk to my client whether they are agreeable to pay the costs to be taxed. SFI now was taken over by an Indian Company and previous management was under different Company.

Court: They have to decide as they are the one who brought this suit to court.

Celestina: It is nothing to do with the management. The person in charge needs to get instruction from Kuala Lumpur office.

Sonny: May we know what would your Ladyship deliver?

Court: I will rule;

(1) Plaintiff's Counsel to withdraw the suit against the Defendant with liberty to file afresh against the Government and the Land and Survey;

(2) Costs to the Defendant to be taxed and damages for trespass against the Plaintiff to be assessed by the Deputy Registrar in nominal amount.

Note: Plaintiff's Counsel asked for stand down for her to get instruction from her client.

Resumes at 11.20 am (Plaintiff's and Defendant's Counsel together with En. Mazlan and Mr. Ho)

Celestina: I have discussed with my client and they agreed to;

(1) Withdraw the case and to file afresh and go against the State Government;

(2) Costs to the Defendant to be taxed;

(3) Dispute on the liability of trespass. I put it to you on record that it is without admission to liability as to trespass or otherwise and it is without prejudice and the Plaintiff is agreeable to compensate the Defendant for the use of the road over his land from the time he became registered owner that is from March 2003 until when the Plaintiff were

A obstructed continuing using of the road in December 2004, totalling 21 months and if RM700.00 per month, it will come up to RM15,000.00 and having regard that the Defendant can still use his land thereafter.

B Sonny: Plaintiff's Counsel did not inform me about what is agreed outside.

Court: Both of you should have discussed this just now. Never mind I let Mazlan and his Counsel to decide now on the proposal. I put it to you forth by the Plaintiff. (Court explained to Mazlan in Malay) – (Pihak Plaintif akan tarik balik saman ini. Pihak kerajaan sudah menulis syarat-syarat tersebut di geran tanah tersebut tetapi tidak membuat susulan atau memprosesnya dengan segera. Ini semua kerja pemalas).

Mazlan: Kes ini sudah berlarutan sejak Disember 2004 dan saya terpaksa menggadaikan 2 buah rumah untuk membayar peguam.

E Court: **I order that the costs will be taxed** and the Deputy Registrar will hear and assess the Damages. It is clear in the Land Title that the Government is allowed to acquire the land at anytime. (emphasis added)

Mr. Ho: Plaintiff only used about 1,000.00 square feet of the Defendant's land.

Court: Parties to lay out all evidence including receipts to support their claim before the Deputy Registrar later.

Mazlan: Bagaimana dengan bayaran Laporan Penilaian?

G Court: Sekiranya tidak dipersetujui maka boleh mengemukakan Rayuan.

Celestina: Our major concern is the liability.

H Court: Not agreeing to the liability without prejudice.

Sonny: Our main concern is if without prejudice. Question is, will they be liable? We feel that liability and assessment should be fixed.

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Court: Get the letter first then proceed to sue the Government. Plaintiff all this while thought that they were given the right to use the said road by the Government.

Sonny: In other words, to bring in the Government to indemnify for them?

Court: Yes.

Sonny: We fear that if without admission of liability they will then turn around and say it is not trespass. So let the Deputy Registrar to decide on it.

Court: The court will look into the predicament suffered by the Defendant and will assess on it. SFI was misrepresented in that they can use the said road. **If the parties agree or disagree with the resolution then they can bring up the matter to the Court Of Appeal**. The case be withdrawn, Court won't give the Defendant a million as under the law he must bring evidence to prove his case. The Defendant can bring all evidence to the Plaintiff and let the plaintiff appoint their expert to assess the bill or damages. When I say look into the damages, you still can use the said land. I cannot say that the Plaintiff, no intentional trespass but to use it to account the Defendant's damages. (emphasis added)

Sonny: So damages to trespass to be assessed.

Celestina: Damages as to trespass (if any) to be assessed. Referring to the counter-claim, we use the alternative prayer that is Mesne Profit. No finding of liability.

Sonny: We want damages for trespass. Mesne Profit is double profit. This is a trespass land case.

Mazlan: Permohonan pihak Plaintif tidak termasuk tanah pihak Defendan.

Celestina: The Plaintiff cannot concede to trespass.

Court: Case won't go for trial on liability as it has to wait for the outcome of the decision from the Government. Defendant has to take separate suit for trespass against the Plaintiff. The Defendant's counsel should have notified his client that the Plaintiff has sued the wrong party.

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Sonny: Taking separate suit for trespass is not possible as the Defendant is caught of the Limitation Ordinance as 3 years had lapsed and he is time barred and my client will sue me for negligence.

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Court: The Defendant's counsel should assist the Court if having known that the Plaintiff is suing the wrong party in the first place. Even in mesne profit, the Defendant has to adduce all documentary evidence to prove it. The longer the Plaintiff settle with the Government, more claim the Defendant can get.

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Mazlan: Saya terima surat dari Kerajaan mengenai Pengambilan Alih ke atas tanah saya.

Court: The Defendant's counsel should have applied for the Defendant's name to be struck out as the sued party and then apply for trespass.

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Sonny: **In that case I withdraw myself as the Defendant's counsel (counsel then walk out from the chamber)**. (emphasis added)

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Court: (Mazlan was then explained about the meaning of Mesne Profit and Damages of trespass in Malay).

Celestina: On record Mr Sonny Durai is not the counsel for the Defendant, it is Mersses Mahap Jelani & Co.

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Court: Fix for hearing before the Deputy Registrar to assess the Damages on 26.11.2008.

Mazlan: Tanah saya sudah terturun setinggi 15 kaki akibat kerosakan yang dilakukan oleh SFI.

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Mr Ho: We will arrange for a joint inspection (together with Mazlan) on the said land before the hearing date 26.11.2001. The Plaintiff has no objection to rectify the land if it is the Plaintiff 's fault. I suggest that the joint inspection should be done this week as I will be away for 2 weeks. Suggest it to be done on 4.11.2008.

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Court: Ruling that item 3 – both parties to go to the site and to determine the damage to the land if any from March 2003 to December 2004 and thereafter to submit all relevant documents to the Deputy Registrar

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(High Court 3) before the hearing date on 26.11.2008 @ 9.00 am and the Plaintiff to exchange documents with the Defendant to be submitted 1 week from tomorrow and 1 week for the Plaintiff to reply.

[10] In my view, there are some notable features from the NOP and they are these:

1. The learned Judge had spoken of the 'right to appeal' by the party should one of the parties be not happy with her resolution.
2. Counsel had asked the court 'what order is being made'.
3. The learned judge had in fact made an order and also 'ruled' on item 3.
4. Counsel for the defendant had withdrawn from the whole process of mediation.
5. There was no mediation agreement signed by both parties.

[11] Counsel for both sides had assumed that what had happened on 3 November 2008 was a mediation session conducted by the learned judge. However from what I have listed as notable features in my view point to the contrary. In a mediation process, the resolution must come from the parties and not from the neutral third party mediator. No order can be made by or come from the mediator. Nor can there be a right of appeal to the Court of Appeal by the unhappy party to the resolution. It could very well be that counsel on both sides was under a misapprehension of what was happening. But whatever had happened and with respect, the session should have been terminated once counsel for the defendant had withdrawn from the session. The withdrawal only points to one thing and that is there was no meeting of minds between the parties. It can be clearly seen that it was a precondition of the defendant's counsel that the element of trespass must be part of the resolution. And when he saw that this was not going to happen, he rightly withdrew from the session. Further the withdrawal of counsel had left the defendant without legal representation which had in my view put the defendant at a huge disadvantage. No doubt his solicitors were present but that did not help as his counsel, Mr Sonny Durai, was

A the point man so to speak at the mediation process. I am fully aware that the learned judge had explained to the defendant what 'mesne profit' meant but with respect that does not mean the defendant understood the whole process. In any event, the defendant had been deprived of legal advice as to the 'orders' B imposed by the learned judge. Hence, I fully appreciate the reasons as to why the defendant had written to the court on 1 February 2011 expressing his views on what had happened on that day.

C **[12]** As for the plaintiffs, it was also crystal clear that there was to be no admission of trespass on their part for reasons as stated in their statement of claim and from what the plaintiffs' solicitor had said in the NOP.

D **[13]** Thus we had two divergent views. Having read and reread the NOP and for reasons stated above, I have no hesitation in saying that there had been no agreement as to how the element of trespass was to be treated in relation of the assessment of damages. I am fortified in my conclusion by the parties' failure to E come to any consensus after three mention sessions before the Registrars. In any mediation settlement, the court must lean towards setting aside any settlement agreement whenever there is any hint of discontent by any party or that there is some ambiguity in the settlement agreement. In this case, this task is made easier by the fact that there was no mediation agreement F signed between the plaintiff and the defendant which in the normal course of event there would be one.

[14] Accordingly I find that the terms of mediation dated 3 November 2008 had not been agreed between the parties.

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Conclusion

[15] For all of the above reasons, I dismiss the plaintiffs' application in encl. 19 with no order as to costs and direct that the trial of this action be set down for trial as soon possible.

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[16] If I may add that there is now a practice direction on mediation, namely Practise Direction No 5 of 2010, which sets out the manner as to how to mediate is to be conducted within the judiciary. Practitioners are well advised that they take heed of what is stated in that Practice Direction.

[17] Order accordingly.